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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

MICHAEL ZELANY,  
Plaintiff,  
vs.  
EDMUND G. BROWN, Jr., *et al.*,  
Defendants.

Case No. CV 17-7357 JCS

Assigned to:  
The Honorable Richard G. Seeborg

Discovery Matters:  
The Honorable Thomas S. Hixson

**PLAINTIFF'S NOTICE OF MOTION  
AND MOTION FOR RELIEF FROM  
NONDISPOSITIVE PRETRIAL ORDER  
OF MAGISTRATE JUDGE**

**[Fed. R. Civ. P. 72 and Local Rule 72-2]**

Date: TBD  
Time: TBD

[Filed Concurrently:  
1. Proposed Order]

Action Filed: December 28, 2017  
Trial Date: November 18, 2019

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that Plaintiff Michael Zeleny ("Zeleny") hereby moves pursuant to Local Rule 72-2 and Federal Rule of Civil Procedure 72 for relief from the March 7, 2019 Order Granting in Part and Denying in Part Motion to Quash (the "Order").

This motion is based on (a) this Notice of Motion and Motion; (b) the Subpoena to Testify at a Deposition in a Civil Action attached as Exhibit A (the “Subpoena”); (c) the records and files herein, including the Complaint (Dkt. No. 1), the Motion to Quash (the “Motion”) of New Enterprise Associates (“NEA”) and associated briefing (Dkts. Nos. 48, 53, 55, 56, 61, and 62), the recording of the hearing on the Motion (Dkt. No. 63), and the Order (Dkt. No. 65); and (d) such other matters as the Court may consider.

# **I. OBJECTIONS TO ORDER.**

Zeleny objects to that portion of the Order that granted the Motion and quashed the following topics of testimony and document requests in the Subpoena:

## **Topic No. 13**

The allegations that Min Zhu raped, molested, sexually assaulted, or otherwise abused Erin Zhu, including the allegations included in 1991 Usenet postings by Erin Zhu CV810705 and subsequently conveyed to NEA and publicized by Zeleny; the allegations included in legal filings and/or Internet postings by Zeleny since December of 1999, and/or publicized and/or relayed by Zeleny since December of 1999; the allegations included in the January 18, 2000 draft complaint by Erin Zhu, filed as an exhibit in Opposition to the Defendants’ Motion to Strike in *Zeleny v. Zhu & WebEx*, Santa Clara Superior Court Case Number CV-809286; his statements in the November 10, 2003 deposition by Erin Zhu in *Zeleny v. Zhu*, Santa Clara Superior Court Case No. CV810705 and subsequently conveyed to NEA and publicized by Zeleny; and the responses of the NEA Parties to those allegations, if any.

## **Topic No. 16**

The relationship between NEA and Min Zhu from 1995 through the present.

## **Topic No. 17**

The relationship between NEA and any current or former business ventures by Min Zhu, including venture capital fund Northern Light, from 2001 through the present.

# # #

## **Request No. 6**

All documents Regarding allegations of rape, child abuse, sexual abuse, molestation, or other abuse allegedly perpetrated by Min Zhu on Erin Zhu.

## **Request No. 7**

All documents Regarding any and all responses by WebEx and/or NEA to allegations of rape, child abuse, sexual abuse, molestation, or other abuse allegedly perpetrated by Min Zhu on Erin Zhu.

## **Request No. 17**

Documents sufficient to show the relationship between NEA and Min Zhu from 1995 to the present.

**Request No. 18**

Documents sufficient to show the relationship between NEA and venture capital fund Northern Light [Min Zhu's venture capital firm] from May 2015 to the present.

Zeleny objects specifically to that portion of the Order, which holds that the truth of the allegations underlying Zeleny's protests is irrelevant to whether his protests are obscene. *See* Order, Dkt. No. 65 at 5:7-16.

**II. GROUNDS FOR OBJECTION****A. Introduction**

The Court should modify the Order to allow Zeleny to take limited discovery on the truth of the content of his protests. This issue is directly relevant to whether the protests are "obscene as to minors" as claimed by the City of Menlo Park (the "City").

The Order addresses a constitutional issue of first impression – *i.e.*, whether the truth of speech is relevant to its "serious literary, artistic, political, or scientific value" under the "*Miller* test" for obscenity. *See Miller v. California*, 413 U.S. 15, 24 (1973). Although no case has directly addressed whether factually false speech can satisfy the "serious value" prong of the *Miller* test, the Supreme Court has long recognized factually false speech has no constitutional value. The *Miller* test incorporates this principle in the "serious value" prong.

Despite thoughtful consideration, the Order errs in holding that the truth of Zeleny's claims is irrelevant to whether his protests are obscene. Because false speech has no constitutional value, it does not meet the "serious value" prong of *Miller*. In order to satisfy that prong, Zeleny needs the ability to show the factual merit of his protests. Without discovery into the truth of the content of his protests, he has no ability to do so.

**B. Background****1. Pertinent Facts**

This case challenges an ongoing, concerted effort by the City of Menlo Park (the "City") and NEA to stifle Zeleny's protests against NEA. Discovery has shown that the City and NEA met repeatedly to develop a "firm solution to ending his protest," including by falsely prosecuting Zeleny and deeming his protests "obscene as to minors" under California Penal

1 Code § 313.1.

2 NEA bills itself as the largest venture capital fund in the world. For years, it has backed  
3 technology executive Min Zhu. Min Zhu's daughter has credibly and publicly alleged that Min  
4 Zhu heinously raped her when she was 14 years old. Despite knowledge of these allegations  
5 (and that Min Zhu has never publicly denied them), NEA has continued to financially back him.

6 Zeleny has protested NEA's backing of Min Zhu since 2009. He has carried unloaded  
7 firearms during these protests. The City concedes that he did so lawfully and that he was  
8 exceedingly cooperative with police at all times. Nonetheless, the City has engaged in a years-  
9 long effort, with NEA's help, to stifle the protests. Most recently, the City insists that Zeleny  
10 needs permits to carry out his demonstrations without being arrested, but refuses to issue them,  
11 and won't even define criteria for the issuance of such permits.

12 Among other things, the City has asserted that Zeleny is not entitled to permits because  
13 the materials used in his protests are "obscene as to minors." Zeleny seeks a declaration that his  
14 protests are not obscene and have "serious value" under the *Miller* test for obscenity.

## 15 **2. Discovery at Issue and the March 7 Order.**

16 Zeleny served the subpoena on NEA seeking, among other things, documents and  
17 testimony on (a) NEA's contacts with the City regarding Zeleny's protests, and (b) evidence  
18 going to NEA's knowledge of the allegations against Min Zhu, its response to those  
19 allegations, and its continuing financial support of Min Zhu. NEA moved to quash. After  
20 briefing, the Court ordered NEA to produce documents and a witness as to the first category,  
21 *i.e.*, contacts with the City, but not as to the second, *i.e.*, Zeleny's allegations against Min Zhu  
22 and NEA. In doing so, the Order concludes that the truth of the content of Zeleny's protests is  
23 not relevant to whether that content is obscene.

## 24 **C. Argument**

25 The Order is erroneous in so holding. The Supreme Court has long held that the truth  
26 of speech is directly relevant to its constitutional value. The *Miller* test,<sup>1</sup> including the

27 <sup>1</sup> Under the *Miller* test, speech is obscene if it (a) appeals to the "prurient interest," (b) depicts  
28 sexual conduct in a "patently offensive way," and (c) "lacks serious literary, artistic, political,

1 “serious value” prong, derives from a long series of Supreme Court cases holding that false  
 2 speech has no constitutional value. In crafting this test, the Supreme Court cited *Roth v.*  
 3 *United States*, 354 U.S. 476, 481-82 (1957), a prior obscenity case. *Miller*, 413 U.S. at 20-21,  
 4 35. *Roth* relied extensively on *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942),  
 5 which held that speech “of [ ] slight social value as a step to truth” is constitutionally  
 6 valueless and may be prohibited. *Roth*, 354 U.S. at 486 (quoting *Chaplinsky*). In short, the  
 7 *Miller* test traces its roots to *Chaplinsky*, which stands for the proposition that speech may be  
 8 prohibited if it lacks value “as a step to truth.”

9 *Chaplinsky* is the leading Supreme Court case for the proposition that factually false  
 10 speech has no constitutionally redeeming value. 315 U.S. at 571-72. The Court has  
 11 consistently so held, and has cited *Chaplinsky* at least a dozen times for this proposition. *E.g.*,  
 12 *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383 (1992); *Gertz v. Robert Welch, Inc.*, 418  
 13 U.S. 323, 339-40 (1974); *Garrison v. State of La.*, 379 U.S. 64, 75 (1964); *Cox Broad. Corp.*  
 14 *v. Cohn*, 420 U.S. 469, 495 (1975); *McDonald v. Smith*, 472 U.S. 479, 487 (1985) (Brennan,  
 15 J., concurring); *Texas v. Johnson*, 491 U.S. 397, 430 (1989) (Rehnquist, J., dissenting). It has  
 16 repeatedly reiterated, for many decades, that false speech lacks constitutional value. *Gertz*,  
 17 418 U.S. at 340 (“there is no constitutional value in false statements”); *Hustler Magazine, Inc.*  
 18 *v. Falwell*, 485 U.S. 46, 52 (1988) (“[f]alse statements of fact are . . . valueless”); *Herbert v.*  
 19 *Lando*, 441 U.S. 153, 171 (“false information . . . carries no First Amendment credentials”).

20 These cases read like a Who’s Who of First Amendment jurisprudence for good  
 21 reason. The proposition that false statements have no First Amendment value is embedded in  
 22 the motivating principle of the First Amendment – *i.e.*, to create a free market for ideas.  
 23 *Hustler Magazine*, 485 U.S. at 52 (false assertions “interfere with the truth-seeking function  
 24 of the marketplace of ideas”); *Red Lion Broad. v. F.C.C.*, 395 U.S. 367, 390 (1969).

25 The Court has applied this reasoning to both obscenity and defamation. *Chaplinsky*,  
 26 315 U.S. at 571-72 (referring to “the lewd and obscene, the profane, [and] the libelous”);  
 27 or scientific value.” *Miller*, 413 U.S. at 24.

1 RAV, 509 U.S. at 382-83 (discussing both); *Roth*, 354 U.S. at 486 (obscenity case). The  
 2 principle that false speech has no redeeming value has carried through every iteration of the  
 3 Court’s test for obscenity. *See Miller*, 413 U.S. at 20-21 (quoting *Chaplinsky* for the  
 4 proposition that speech may be prohibited if it “lacks value as a step to truth”); *Roth*, 354 U.S.  
 5 at 486. By quoting this passage of *Chaplinsky*, and citing extensively to *Roth*, the Court in  
 6 *Miller* gave every indication that it was incorporating this established standard of  
 7 constitutional value – *i.e.*, speech with value towards finding the truth. There is no basis to  
 8 treat obscenity differently when the Court’s test for obscenity derives from the very cases that  
 9 establish this principle.

10 The truth of Zeleny’s speech is also relevant to its redeeming “serious value” as a  
 11 practical matter. His protests are no doubt provocative, and intentionally so. However, to the  
 12 extent that he has exposed a large-scale coverup of child rape, there is ample redeeming value  
 13 to the protests that would overcome a claim of obscenity. The City has made clear that it  
 14 intends to defend this case by casting Zeleny’s allegations as wild and unsubstantiated  
 15 conspiracy theories. According to the City, it has never seen fit to investigate Zeleny’s  
 16 claims—but, apparently, helped NEA shut him up—because his allegations amount to mere  
 17 “rumors” and speculation not warranting an investigation. If the City intends to argue that  
 18 Zeleny’s protests lack factual merit, Zeleny needs the evidence to prove otherwise.

#### 19 **D. Conclusion**

20 Because the truth of Zeleny’s protests is directly relevant to his First Amendment  
 21 claim, he should be allowed to take limited discovery from NEA necessary to prove the truth  
 22 of the claims that form the basis for his protests.

23 Dated: March 21, 2019

Respectfully submitted,

24 s/ Damion Robinson

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25 Damion D. D. Robinson

26 Affeld Grivakes LLP

Attorneys for Plaintiff Michael Zeleny

**PROOF OF SERVICE**

I hereby certify that on March 21, 2019, I electronically filed the foregoing document using the Court's CM/ECF system. I am informed and believe that the CM/ECF system will send a notice of electronic filing to the interested parties.

s/ Damion Robinson  
Damion Robinson